No. 93-1822

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JAMES RICHARD O'CONNER,

Petitioner,

v.

COMMONWEALTH EDISON COMPANY and
LONDON NUCLEAR SERVICES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Does the "arising under" clause of Article III support federal jurisdiction over "public liability actions" under the Price-Anderson Act, 42 U.S.C. § 2014(hh), when Congress directs the courts to derive the rules of decision from substantive state law that is consistent with the comprehensive federal framework governing nuclear energy?

2. Do the federal regulations allowing radiation exposure within the Federal Permissible Dose Limits define the duty owed in a "public liability action"?

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

Respondents Commonwealth Edison Company and London Nuclear Services, Inc., defendants in this Price-Anderson public liability action, submit this brief in opposition to the plaintiff's petition for a writ of certiorari.[1]

1. Respondents' Sup. Ct. R. 29.1 Statement is contained in the Appendix at 40a.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Court of Appeals is reported at 13 F.3d 1090 (7th Cir. 1994). The District Court's rulings are reported at 748 F. Supp. 672 (C.D. Ill. 1990) (federal regulations governing radiation exposure of nuclear worker constitute the standard of care), 770 F. Supp. 448 (C.D. Ill. 1991) (jurisdictional provision of Price-Anderson Amendments Act of 1988 is constitutional), and 807 F. Supp. 1376 (C.D. Ill. 1992) (granting defendants' motion for summary judgment). All of the foregoing opinions are contained in the Petitioner's Appendix ("Pet. App.").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to Article III, Section 2 of the United States Constitution, which is set forth in the Petition for Certiorari, the provisions of 42 U.S.C. §§ 2210, 2012-14, and 10 C.F.R. § 20.101 are involved in this case and are set forth in their entirety in Respondents' Appendix at 1a-40a.

STATEMENT OF THE CASE

A. The Nature Of The Present Litigation.

This is a public liability action arising under the Price-Anderson Act as amended by Pub.L. No. 100-408, 102 Stat. 1066 (1988) (the "Amendments Act") (codified in scattered sections of 42 U.S.C.), an integral part of the Atomic Energy Act. 42 U.S.C. § 2011, *et seq*. The Amendments Act creates original federal jurisdiction over any claim of injuries allegedly caused by exposure to radioactive material at a facility covered by the Act. 42 U.S.C. § 2014(hh). The plaintiff, James O'Conner, is a contract nuclear worker who developed small bilateral posterior subcapsular cataracts (a heritable condition) at age forty-four, just as his father, who never worked in the nuclear industry, had developed bilateral posterior

subcapsular cataracts by the age of thirty-nine.[2] Mr. O'Conner brought this negligence action against Commonwealth Edison Company, the owner of Quad Cities Nuclear Station ("Quad Cities"), and London Nuclear Services Inc., a contractor that provided nuclear services there, alleging that his cataracts were caused by an excessive radiation exposure that he received while working at Quad Cities.

B. Course Of The Proceedings And Disposition In The Courts Below.

This action was commenced in state court and was removed on September 13, 1988 to the United States District Court for the Central District of Illinois pursuant to the removal provisions of the Amendments Act. 42 U.S.C. § 2210 (n)(2). On defendants' motion for determination of the legal duty owed to plaintiff, the district court concluded that the federal regulations setting Federal Permissible Dose Limits for nuclear workers constituted the applicable duty owed. 748 F. Supp. 672, Pet. App. 1d. Plaintiff then sought a remand of the action to state court on the ground that the jurisdictional provision of the Amendments Act was unconstitutional. The district court denied plaintiffs' motion to remand, holding that the jurisdiction created by the Amendments Act was within Article III's "arising under" jurisdiction. 770 F. Supp. 448, Pet. App. lc. Defendants filed a motion for summary judgment because there was no evidence that plaintiff had received a dose in excess of the Federal Permissible Dose Limits set forth at 10 C.F.R. § 20.101 (1992), and because there was no evidence that plaintiff's occupational radiation exposure caused any injuries to him. The District Court entered

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2. *O'Conner v. Commonwealth Edison Co.*, 807 F. Supp. at 1388, Pet. App. at 23b; *O'Conner v. Commonwealth Edison Co.*, 748 F. Supp. 672, Pet. App. at 3d.

summary judgment for the defendants.[3] 807 F. Supp. 1376, Pet. App. 1d.

Upon dismissal of his case Petitioner appealed to the United States Court of Appeals for the Seventh Circuit. Petitioner presented three grounds for that appeal. One of those grounds was the District Court's exclusion of his sole expert on duty owed and causation. The case was argued in the Seventh Circuit prior to this Court's ruling in *Daubert v. Merrell Dow Pharmeceuticals, Inc.*, 113 S.Ct. 27 (1993), and resolution was delayed by the Court of Appeals until after the *Daubert* decision. The Court of Appeals affirmed each of the District Court's three published decisions. 13 F.3d 1090 (7th Cir. 1994), Pet. App. 1a. Petitioner does not seek review of the post-*Daubert* exclusion of his sole duty owed and causation expert witness.

C. The Public Liability Action Under The Atomic Energy Act, As Amended By The Price-Anderson Act.

The Article III question Petitioner presents requires consideration of the federal ingredients in a congressionally defined federal cause of action, the "public liability action." Yet, the Petition provides scant description of the comprehensive and unique federal nuclear energy regulatory scheme of which this cause of action is a part.

In 1954, with the passage of the Atomic Energy Act, Congress ended the legal monopoly of the federal government over production and use of nuclear fuels. Congress' purpose in doing so was "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes . . . ." § 42 U.S.C. 2013(d). But it quickly became apparent that private investment would not be forthcoming if there were no limits on potential liability. S. Rep. No. 296, 85th Cong.,

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3. The procedural history of this case is set forth in detail in the District Court's Findings of Fact and Conclusions of Law. 807 F. Supp. 1376, Pet. App. 1d.

lst Sess. 1, reprinted in 1957 U.S. Code Cong. & Admin. News 1803. The Price-Anderson Act was designed "to remove the economic impediments in order to stimulate the private development of electric energy by nuclear power while simultaneously providing the public compensation in the event of a catastrophic nuclear incident." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83 (1978).

Congress mandated that licensees of commercial nuclear power reactors be capable, through private insurance or by other financial means, of responding to claims for damages arising out of a nuclear incident, up to federally specified limits. 42 U.S.C. § 2210(b). "Nuclear incident" was defined to cover any event causing injuries "arising from the special dangerous properties" that made nuclear risk a subject of federal regulation. S. Rep. No. 296, 85th Cong., 1st Sess. 16, *reprinted in* 1957 U.S. Code Cong. & Admin. News at 1817; *see* 42 U.S.C. § 2014(q).

Congress recognized that a nuclear incident might be caused by any of a number of participants in the nuclear industry. Congress did not want compensation to be hampered by the complications likely to ensue if multiple defendants were actively defending. In a "significant departure from normal tort law precepts," H.R. Rep. 104, 100th Cong., 1st Sess., pt. 3 at 16 (1987), Congress, through mandatory indemnification provisions, channelled all public liability to licensees, and away from non-licensees who might otherwise have borne such liability under ordinary tort law. *See* 42 U.S.C. §§ 2014(t), 2014(w), 2210(a).[4] The channelling

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4. Congress recognized that the channelling provisions would protect even a complete stranger to the industry who causes a nuclear incident, such as an errant pilot. *Governmental Indemnity and Reactor Safety: Hearings Before the Joint Comm. on Atomic Energy, 85th Cong., 1st Sess. 20, 109, 114-15, 165 (1957). See also* S. Rep. No. 296, 85th Cong., 1st Sess. 17, *reprinted in* 1957 U.S. Code Cong. & Admin. News at 1818-19.

provisions dramatically changed the ordinary congruence in tort law between causing and bearing liability.

If a nuclear incident caused damages in excess of the primary financial protection required of the licensee, the federal government indemnified anyone who was liable up to a specified limit. 42 U.S.C. § 2210(c). All public liability growing out of a single nuclear incident was capped at the total of the financial protection and the indemnification. 42 U.S.C. § 2210(e).

After passage of the Price-Anderson Act, Congress continued to refine the compensation provisions over a thirty year period. In 1966, dissatisfied with substantive state tort law, Congress authorized the Nuclear Regulatory Commission ("NRC") to require licensees to waive negligence and other defenses in the event of an extraordinary nuclear occurrence ("ENO"), and conferred federal jurisdiction over claims for public liability arising out of such an occurrence. 42 U.S.C. § 2210(n)(2). Congress also authorized federal courts to formulate an equitable distribution plan whenever the federal liability limits may be exceeded. 42 U.S.C. § 2210(o). In 1975, Congress mandated a second tier of private insurance, to be funded by deferred premiums paid by all licensees of nuclear power reactors, if and when required. 42 U.S.C. § 2210(b). This retrospective premium obligation constitutes a federally mandated industry-wide shared liability rule. Congress also committed itself to further compensation in the event damages exceeded the cap on public liability. 42 U.S.C. § 2210(e).

In 1988, in the Amendments Act, Congress addressed the problem of the nuclear incident that is not an ENO. Congress adopted a national policy of uniform treatment for all persons injured in a nuclear incident. *See* H.R. Rep. No. 104, 100th Cong., lst Sess., pt. 1, at 18 (1987) ("desire of Congress for equitable and uniform treatment of victims of a nuclear accident"). The Amendments Act creates an exclusively federal cause of action, the "public liability action," which encompasses "any suit asserting public liability," 42 U.S.C.

§ 2014(hh);[5] confers original and removal jurisdiction for public liability actions arising out of a given nuclear incident on a single federal district court – the district court in the district where the nuclear incident occurred, 42 U.S.C. §§ 2014(hh), 2210(n)(2); and directs that the "substantive rules for decision" in public liability actions "shall be derived from the law of the State in which the nuclear incident involved occurs" unless the state law is "inconsistent" with the Act. 42 U.S.C. § 2014(hh).

In the Amendments Act, Congress also enacted special case management and consolidation authorities for the federal district court, and authorized the adoption of special procedural rules to expedite cases or to allow more equitable consideration of claims. 42 U.S.C. § 2210(n)(3).[6]

REASONS FOR DENYING THE WRIT

A. THE ARTICLE III ISSUE DOES NOT WARRANT REVIEW.

1. The Decision Below Applied Traditional Principles To A Distinctive Federal Statute; It Is Not In Conflict With Any Other Court Of Appeals Decision.

This case involves the application of Article III to a highly particularized federal statute which is a part of a

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5. "Public liability" is separately defined as "*any* legal liability arising out of or resulting from a nuclear incident . . . ." 42 U.S.C. § 2014(w) (emphasis added).

6. Contrary to the representation in the Petition that only the TMI defendants went before Congress to seek the Amendments Act, (Pet. at 11), the "decision to expand the jurisdictional grant was based upon [testimony by] '[a]ttorneys representing *both plaintiffs and defendants* in the TMI litigation . . . that the ability to consolidate claims in federal court would greatly benefit the process for determining compensation for claimants . . . .'" *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 833 n. 18 (3rd Cir. 1991), *cert. denied*, 112 S.Ct. 1262 (1992) ("*In re TMI*") (*quoting* S. Rep. No. 218, 100th Cong., 2d Sess. 13 (1988) (emphasis added)).

highly complex federal scheme to supervise nuclear power. There is no conflict between the two appellate courts that have addressed this issue.[7] The appellate court decision is not in conflict with any decision of this Court, nor does it apply any new Article III "arising under" principles.

The United States Court of Appeals for the Seventh Circuit solidly rested its analysis upon the traditional Article III law established by *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat) 738 (1824) and *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 430 (1983). *Osborn* required that federal law "form[ ] an ingredient of the original cause" and *Verlinden* required not only the invocation of jurisdiction but the exercise of Article I legislative powers as well. 13 F.2d at 1097-98 (*citing In re TMI*, 940 F.2d at 833 (*citing Osborn*, 22 U.S. at 823)); *Verlinden*, 461 U.S. at 496-97. The Court of Appeals reviewed the broad definition of the "public liability action," 42 U.S.C. § 2014(hh), the direction of the Act to derive the substantive rules of decision from only "consistent" state law, *id.* at § 2014(hh), the necessity for a federal determination whether the injuries alleged arose out of a "nuclear incident," *id.* at § 2014(q), the federal statute of limitations applicable to actions arising out of an ENO, *id.* at § 2210(n)(1), and the federal waivers of defenses in such actions, *id.* at § 2210(n), and determined that those "federal ingredients" make the action one "arising under" federal law. *O'Conner*, 13 F.3d at 1101, Pet. App. at 19a. It concluded: "The presence of these federal ingredients in the Amendments Act is particularly convincing when their significance is assessed not in a vacuum but in relation to the entire federal regulatory scheme. . . ." 13 F.3d at 1101, Pet. App. at 19a. This conclusion does not warrant certiorari review.

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7. *O'Conner*, 13 F.3d 1090 (7th Cir. 1994); *In re TMI,* 940 F.2d 832 (3rd Cir. 1991), *cert. denied,* 112 S.Ct. 1262 (1992).

2. The Court Of Appeals Correctly Decided The Article III Issue.

The Petition asserts that "the mere presence of a federal issue in a state cause of action is insufficient to create federal question jurisdiction." Pet. at 16 (*citing Merrell Dow Pharmaceuticals, Inc. v. Thomson*, 478 U.S. 804 (1986)). But *Merrell Dow* speaks to the "well pleaded complaint rule," applicable to a determination of the existence of federal question jurisdiction under 28 U.S.C. § 1331.[8]

Petitioner also insists that the Amendments Act is a "hollow grant of federal jurisdiction" and therefore constitutionally deficient. Pet. at 14. But that argument is clearly incorrect as demonstrated by the lower court's statutory analysis.

When Congress enacted the Price-Anderson Act, which the Amendments Act amends, it expressly exercised Article I powers other than its power to constitute inferior federal courts. *See* 42 U.S.C. §§ 2012, 2013(d); S. Rep. No. 296, 85th Cong., 1st Sess. 15, *reprinted in* 1957 U.S. Code Cong. & Admin. News at 1816. "The liability-limitation provision [is] a classic example of an economic regulation . . . ." *Duke Power*, 438 U.S. at 83. Congress' exercise of substantive Article I powers supports Article III "arising under" jurisdiction. *Verlinden*, 461 U.S. at 496 ("Congress expressly exercised its power to regulate foreign commerce").

Moreover, unlike the statute in *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1852), Congress did not simply say that federal courts have

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8. For that reason, *Stibitz v. General Pub. Util. Corp.*, 746 F.2d 993 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985) and *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490 (3d Cir. 1986), are irrelevant to the analysis. *See* Petition at 18. Both *Stibitz* and *Kiick* were pre-Amendments Act cases decided on the basis of the well pleaded complaint rule and its application to federal question jurisdiction under 28 U.S.C. § 1331. (*Commonwealth of Pennsylvania v. General Pub. Util. Corp.*, 710 F.2d 117 (3d Cir. 1983), did not address subject matter jurisdiction).

jurisdiction over torts arising out of nuclear incidents. Rather, "the jurisdictional provisions of the Act are simply one part of [a] comprehensive scheme," *Verlinden*, 461 U.S. at 496, in this case a complex and comprehensive federal scheme of compensation and safety regulation. Under this comprehensive scheme, there is more than a "mere speculative possibility that a federal question may arise at some point in the proceeding." *Id.* at 493.

By statute, the starting point of any public liability action must be the federal statutory question: Is this case one claiming compensation for "bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material"? (Definition of "nuclear incident" at 42 U.S.C. § 2014(q)). If not, then the action is not a "public liability action" and no part of the Price-Anderson Act, including its jurisdictional provisions, applies.

But if the action is one seeking compensation as a result of a "nuclear incident" as defined (*i.e.*, as a result of the nuclear risk which was the subject of Congress' concern and of the extensive federal regulatory framework), then it is a "public liability action." *See* 42 U.S.C. §§ 2014(w), 2014(hh). From that determination flow a number of consequences having far more than mere jurisdictional significance.

First among these is that any judgment, state or federal, will be satisfied from the funds in the mandated financial protection system, rather than from the assets of individual defendants, and total public liability is subject to a federal ceiling. These provisions remove the risk that a plaintiff may be unable to recover on a judgment, and that a defendant could sustain a bankrupting liability. Second, licensees bear the financial responsibility for "public liability," even if they are not the cause of the injury, and non-licensees may not be held financially responsible, even if they are the cause.

Cf. Verlinden, 461 U.S. at 496-97 (the Foreign Sovereign Immunities Act "governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state"). The deterrence role of ordinary tort law is thus altered. Indeed, liability that reaches the second tier of financial protection, funded by the retrospective premiums, would be borne by all federal licensees. The retrospective premiums provision thus creates an industrywide shared liability rule.

Furthermore, given the dual investment and compensation objectives of the Price-Anderson Act, a plaintiff may not simply choose to "waive" the federal compensation scheme and pursue his traditional state law remedies. One of the principal purposes of the Price-Anderson Act was to remove the disincentive to participation in the nuclear power program identified when the Act was initially adopted. In order to achieve that purpose, Congress made the decision to insulate the assets of those participating in the industry from tort suits, and to replace that source of funds with the "financial protection system" of the Act. *See* pp. 4-7, *supra*.[9]

In terms of Article III jurisprudence, then, whether or not a plaintiff's complaint precipitates operation of the "financial protection system" will "for[m] an original

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9. Because the public liability action is the exclusive means by which someone injured as a result of a nuclear incident may obtain compensation, it makes no difference whether the plaintiff invokes the Act or ignores it. A plaintiff whose injury is alleged to have resulted from the nuclear risk may not "waive" his federal action and pursue state law recovery, since to do so would frustrate that aspect of the Price-Anderson Act which protects private participants in the nuclear power industry. Similarly, a plaintiff may not have access to the federally-created financial protection system unless his injury is alleged to have resulted from a nuclear incident as to which Price-Anderson is controlling. A plaintiff alleging that he dropped a heavy fuel rod on his foot, breaking a bone, would not have access to the financial protection funds; a plaintiff alleging a cancer from exposure to radiation from that same fuel rod would not be able to obtain and execute upon a state or federal court judgment apart from the financial protection system.

ingredient in every cause." *Osborn*, 22 U.S. at 824. The provisions of the Price-Anderson Act do not "merely concern access to the federal courts." *Verlinden*, 461 U.S. at 496. The provisions will always determine who pays, and they may determine whether anyone pays.[10] The provisions will determine which state law rules are adopted as not being "inconsistent" with the federal compensation scheme. The provisions will determine which claims are subject to the cap on liability, whether non-licensees are protected by the channelling provisions, and whether the retrospective premium provisions will apply. Congress may "secure . . . a trial in the federal courts, *Osborn*, 22 U.S. at 822, for persons whose liability Congress has imposed, capped, or channeled entirely to others.

Apart from the structural changes effected by the Act, resolution of the question of duty owed in public liability actions will certainly involve the application of federal safety regulations, whether because the state law is found to incorporate the federal standard (as numerous courts have found) or because contrary state law would be inconsistent with the federal framework governing nuclear power.[11]

Additional federal ingredients will necessarily be present in every public liability action, because

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10. For example, an action barred by the statute of limitations of the incident-state might be barred completely, even if the statute of limitations to be applied would otherwise have been that of the state in which the action had been commenced. *Cf. Bonner v. Chevron U.S.A.*, 668 F.2d 817 (5th Cir. 1982). The "precautionary evacuation" (*see* 42 U.S.C. § 2014(gg)) creates a remedy unknown at common law (the essence of a "public nuisance" at common law is that the general public cannot recover for it). The omnibus insurance and indemnity will eliminate contribution and indemnity claims which often dominate other "toxic tort" litigation.

11. *See, e.g., O'Conner*, 13 F.3d 1090, Pet. App. at 1a; *In re TMI*, 940 F.2d at 832; *Coley v. Commonwealth Edison Co.*, 768 F. Supp. 625 (N.D. Ill. 1991); *Hennessy v. Commonwealth Edison Co.*, 764 F. Supp. 495, 501 (N.D. Ill. 1991); *O'Conner*, 748 F. Supp. at 678, Pet. App. 1d.

§ 2014(hh) requires that the court hearing that action "derive" the "substantive rules for decision" from the law of the state where the nuclear incident occurred, unless such state law is "inconsistent" with provisions of the federal scheme. In applying this federal statute, the trial court must first determine what rules of decision are "substantive" within the meaning of the statute. That is a federal question.[12] Having made that decision, the court must then compare the substantive rules of decision of the incident state with the federal regulatory framework to determine whether there is any inconsistency. That is also a federal question.[13] As such, these questions must be decided in light of the text, structure and purpose of the Price-Anderson Act, in its larger context as part of the Atomic Energy Act and the federal regulations promulgated under that Act. Plaintiff's argument that compliance with the Permissible Dose Standards is only evidence of due care (Pet. at 20), is an excellent example of a threshold federal question sufficient to satisfy Article III jurisdiction.

Finally, under Congress' decision to "derive" rules of decision from the law of the incident-state (which in and of itself leaves considerable room for the exercise of

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12. It is doubtful that the body of law following *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), will provide a ready source of answers. The policies and purposes of the Price-Anderson Act are not of *Erie* and the Rules of Decision Act. For example, the proper conflict-of-laws rule will be the one contained in the Price-Anderson Act, 42 U.S.C. § 2014(hh).

13. The possible areas in which the question of inconsistency may arise are manifold. For example, should claims for loss of consortium, assuming state law permits them, be compensable under the Act's definition of "bodily injury, sickness, disease, or death;" should claims for increased risk of future injury be presently compensable, which the laws of some states permit, when the federal compensation scheme expressly directs that funds be held in reserve for "possible latent injury claims which may not be discovered until a later time," 42 U.S.C. § 2210(o)(1)(C), and provides a discovery rule for limitations of actions. *Id.* at § 2210(n)(1).

judgment by the court), state law applies in a public liability action only because Congress adopted it as federal law.

When Congress determines that the content of certain rules of decision needed to fill out its program are to be derived from state law, as it did in the Amendments Act, it is exercising its legislative authority to regulate under Article I. It makes a "basic legislative decision . . . to conform the [federal] laws . . . to the local laws . . . " *United States v. Sharpnack*, 355 U.S. 286, 293 (1958) (rejecting delegation attack on Federal Assimilative Crimes Act).

There are good reasons why Congress made such a choice in the Amendments Act. A principal purpose of Congress was to secure the efficient determination of public liability actions. To secure those goals, it made perfect sense for Congress to refer to well developed state law tort rules with which both counsel and the courts would already be familiar. It is not because of congressional default or indifference that state law found not to be "inconsistent" was selected to provide the content of the federal rules of decision. The incorporation of state rules into the larger federal matrix of Congress' program was an affirmative choice to serve an identified federal goal.

What is involved here is not the general question whether, because an adoptive statute is a legislative act of Congress under Article I, it is *without more* a law of the United States under Article III. For here, as in *Verlinden*, there is more.[14] As already described, Congress has occupied the entire field of nuclear safety

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14. Because *Verlinden* found that specific federal questions were necessarily involved in suits under the Foreign Sovereign Immunities Act, it did not reach the question whether the adoptive provisions of that Act would separately satisfy Article III. *See* 461 U.S. at 495 n.22.

regulation, and altered the opportunity for recovery and the incidence of liability through the compensation scheme.

It is in the context of these substantive federal purposes that Congress authorized courts to "derive" a federal rule of decision from state law. This is not an adoptive statute without more. Congress' express, deliberate adoption of state law as federal law in the Amendments Act satisfies the requirement of Article III "arising under" jurisdiction that a case arise under federal law. There is no novel or difficult Article III question requiring review by this Court.

B. The Duty Owed Issue Does Not Warrant Review.

1. The Decision Below Is Not In Conflict With Any Other Court Of Appeals Decision And Applied Long-standing Supreme Court Precedent On The Federal Preemption Of Nuclear Safety Issues.

The only two appellate courts to address this issue, *In re TMI* and *O'Conner*, agree that it is not consistent with Congress' preemption of all safety aspects of nuclear power and with Congress' total occupation of the field of nuclear hazard litigation to adopt a standard of care inconsistent with the NRC regulation establishing Permissible Dose Limits[15] for exposures to the precise hazard involved. "Plaintiff's rights will necessarily be determined, in part, by reference to federal law, namely the federal statutes and regulations governing the safety and operation of nuclear facilities." *In re TMI*, 940 F.2d at 860.

In *Pacific Gas & Elec. Co. v. State Energy Conservation and Dev. Comm'n*, 461 U.S. 190 (1983), this Court held that "the Federal Government has occupied

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15. 10 C.F.R. § 20.101.

the entire field of nuclear safety concerns." *Id.* at 212-13. The federal government "maintain[s] complete control of the safety and 'nuclear' aspects of energy generation." *Id.* at 212.[16]

Federal preemption of the safety aspects of nuclear power was reaffirmed in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 240-41 (1984), when this Court commented that "states are precluded from regulating the safety aspects of nuclear energy,"[17] and again in *English v. General Elec. Co.*, 496 U.S. 72, 82 (1990), when this Court held that "Congress intended that only 'the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear power plant.' " *Id.* (*quoting Pacific Gas*, 461 U.S. at 205).

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16. The conclusion in *Pacific Gas* flowed, in part, from the Cooperation with States Amendment to the Atomic Energy Act, Pub. L. No. 86-373, § 247(c)(1), 1959 U.S.C.C.A.N. (73 Stat.) 78 (current version at 42 U.S.C. § 2021(c)), which permitted the States to engage in regulation of certain nuclear materials under limited conditions. 461 U.S. at 209. That amendment expressly reserved the regulation of the safety aspects of nuclear power plants to the federal government while allowing certain state regulation "for purposes other than protection against radiation hazards." *Pacific Gas*, 461 U.S. at 210. As stated in *Pacific Gas*, "from the passage of the Atomic Energy Act in 1954, through several revisions, and to the present day, Congress has preserved the dual regulation of nuclear-powered electricity generation: the Federal Government maintains complete control of the safety and "nuclear" aspects of energy generation; the States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." 461 U.S. at 212 (footnote omitted).

17. In *Silkwood*, a pre-Amendments Act case, a majority of this Court permitted an award of punitive damages under state law. However, it was undisputed that the federal regulations governing offsite exposure to plutonium were exceeded. *See Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 583 (W.D. Okla. 1979) (Silkwood's exposure to plutonium in her apartment exceeded by two and a half times the exposure permitted), *rev'd on other grounds*, 667 F.2d 908 (10th Cir. 1980), *rev'd*, 464 U.S. 238 (1984).

Lower court decisions involving the direct efforts of states to regulate the design, operations or effluent levels of a nuclear reactor are in accord. *See, e.g., Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1154 (8th Cir. 1971) (federal government has exclusive authority to regulate construction and operation of nuclear power plant, including levels of effluent discharge), *aff'd mem.*, 405 U.S. 1035 (1972); *Jersey Cent. Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1112 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986) (federal law governs radiological safety aspects of nuclear power industry including the storage and shipment of spent fuel); *Long Island Lighting Co. v. County of Suffolk*, 628 F. Supp. 654, 665 (E.D. N.Y. 1986) (offsite testing of utility's radiological emergency response is within sphere of authority reserved for federal government). So, too, are lower court decisions on the applicable standard of care in public liability actions such as this.

In *In re TMI*, the Third Circuit held that "[p]ermitting the states to apply their own nuclear regulatory standards, in the form of the duty owed by defendants in tort, would . . . frustrate the objectives of the federal law." 940 F.2d at 859 (quotation omitted). "Under *Pacific Gas & Electric Co.*, states are preempted from imposing a non-federal duty in tort, because any state duty would infringe upon the pervasive federal regulation in the field of nuclear safety and, thus would conflict with federal law." *In re TMI*, 940 F.2d at 859 (*citing Pacific Gas*, 461 U.S. at 204). The Court of Appeals in *In re TMI* expressly recognized that tort law standards either stricter or more lenient than the federal regulatory standards were preempted:

> The result [conflict with federal law] is the same regardless of whether the state adopts stricter or more lenient safety standards. If stricter standards are imposed, the state will create a disincentive to nuclear power that is in conflict with federal law. If

> more lenient standards are imposed, the state will undercut federal safety efforts.

In re TMI, 940 F.2d at 860 n. 22.[18]

The federal regulation of radiation exposures to nuclear workers or neighbors of a nuclear power plant is at the very core of the area which this Court has determined is within the exclusive authority of the federal government. The Seventh Circuit's analysis

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18. *See also Akins v. Sacramento Mun. Util. Dist.*, 6 App.4th 1605, 8 Cal. Rpt.2d 785 (3d Dist. 1992), *rev. dismissed*, 28 Cal. Rptr.2d 150, 868 P.2d 905 (Cal. 1994), in which the court concluded that public liability claims based on exposure to radiation from the discharge of effluent from a nuclear power plant were "barred by federal preemption." *Id.* at 1637, 8 Cal. Rptr.2d at 804. As stated in *Akins*:

> [A] claim that mere potential exposure at levels below federal radiation protection standards creates a sufficiently unreasonable risk of harm to support compensation for the exposure itself "would conflict directly with the countervailing judgment of the NRC" and "would also be in the teeth of the Atomic Energy Act's objective to insure that nuclear technology be safe enough for widespread development and use," and would accordingly fall within matters foreclosed to the states.

Id. at 1638, 8 Cal. Rptr.2d at 805 (*quoting Pacific Gas,* 461 U.S. at 213). The court in *Akins* concluded that "federal safety regulations establish the duty element of a state tort cause of action and . . . there can be no liability in the absence of a violation of federal standards."). *Id.* at 240-41, 8 Cal. Rptr.2d at 805 (*citing In re TMI*, 940 F.2d at 859-60). Similarly, in *Whiting v. Boston Edison Co.*, no. 88-2125 (D. Mass. Sept. 5, 1991), the court concluded that the federal permissible occupational dose limits constituted the standard of care:

> As demonstrated by the substantial precedent on this issue, the Federal Permissible Dose Standard was enacted to protect workers at nuclear power plants from exposure levels that would be expected to produce the type of harm alleged here, namely, radiation induced physical injury. The Standard was based upon consensus scientific study and developed on the basis of extensive scientific studies. To the extent that a question of state law might be raised that question is resolved by the opinion in [*In re TMI*].

Slip op. at 2.

draws directly from this precedent, citing "uncontradicted statements by the Supreme Court that federal nuclear safety regulations preempt all state safety regulations." 13 F.3d at 1104, Pet. App. at 26a. Relying on *Pacific Gas*, 461 U.S. at 208 ("the safety of nuclear technology was the exclusive business of the Federal Government"), and *Silkwood*, 464 U.S. at 240-41 (addressing "foreclosure of the States from conditioning the operation of nuclear plants on compliance with state imposed safety standards"), the lower court "agree[d] with the Third Circuit in *TMI* that it is clear from *Pacific Gas* and from *Silkwood* that state regulation of nuclear safety, through either legislation or negligence actions, is preempted by federal law." *O'Conner*, 13 F.3d at 1105, Pet. App. at 26a, 27a-28a (*citing In re TMI*, 940 F.2d at 858). It concluded, as did the Third Circuit, that " 'states are preempted from imposing a non-federal duty in tort, because any state duty would infringe upon pervasive federal safety regulations in the field of nuclear safety, and thus would conflict with federal law.' " 13 F.3d at 1105, Pet. App. at 28a (*quoting In re TMI*, 940 F.2d at 859).

The Seventh Circuit's decision is not in conflict with any of the foregoing decisions. The preemption issue is settled in this Court, and the decision below raises no novel or difficult preemption question requiring review by this Court.

2. The Decision Below Properly Applied The Rule Of Decision Analysis Mandated By The Price-Anderson Act; It Is Not In Conflict With Any Other Decision.

In addition to its conclusion that federal safety regulations must apply in this tort action as a result of federal preemption, the lower court concluded that the rules of decision analysis mandated by the Price-Anderson Act also requires application of the federal regulations as the standard of care. This conclusion is entirely consistent with the express directive of the Act and other public liability cases applying the Act. It

raises no novel question of statutory construction nor a conflict among circuits warranting review.

While the substantive rules for decision in a public liability action are to be derived from the law of the "incident" state, the Price-Anderson Act dictates that they are not to be so derived if that state's rules are "inconsistent with" the Act. 42 U.S.C. § 2014(hh). In considering whether a state standard of liability is "consistent" or "inconsistent" with federal law, the court below properly looked at the structure, nature and purpose of the Price-Anderson Act. In doing so, the court below followed the instructions of this Court for resolving questions of inconsistency between state and federal law. *See Robertson v. Wegmann*, 436 U.S. 584, 589-90 (1978) ("In resolving questions of inconsistency between state and federal law raised under [42 U.S.C.] § 1988, courts must look not only at particular federal statutes and constitutional provisions, but also at the policies expressed in them . . . . Of particular importance is whether application of state law would be inconsistent with the federal policy underlying the cause of action under consideration") (citations and quotations omitted).

Under the rules of decision analysis, "a clear statutory prescription," *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), or "a direct conflict," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), between the federal and state standards is not required. In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), this Court explained:

> The conflict with federal policy need not be as sharp as that which must exist for ordinary preemption when Congress legislates 'in a field which the States have traditionally occupied' . . . . Or to put the point differently, the fact that the area in question *is* one of unique federal concern changes what would otherwise be a conflict that cannot produce preemption into one that can.

Boyle, 487 U.S. at 507-508 (citation omitted; emphasis in original).

The public liability action is an area of "unique federal concern." *Boyle*, 487 U.S. at 508. Indeed, it is the *only* means by which anyone claiming to have been injured as a result of a "nuclear incident" may claim compensation. *In re TMI*, 940 F.2d at 854 ("After the Amendments Act, no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all*") (emphasis in original).

The Seventh Circuit reasoned:

> Imposing a standard of care other than the federal regulations would disturb the carefully crafted balance between private involvement and safety that Congress has achieved. Thus, the application of something other than the federal safety regulations as a standard of care is inconsistent with the Price-Anderson scheme and consequently cannot be applied in a public liability action.

O'Conner, 13 F.3d at 1105, Pet. App. at 29a.

The Seventh Circuit's conclusion that a state standard contrary to the federal regulations would upset the Act's "carefully crafted balance" between the dual goals of public protection and nuclear development that Congress has achieved in the development of the Atomic Energy Act and the Price-Anderson amendments thereto, 13 F.3d at 1105, Pet. App. at 29a, is well founded. The balance identified by the Seventh Circuit has been recognized by this Court. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83 (1978) (purpose of Price-Anderson Act was to "stimulate the private development of electric energy by nuclear power while simultaneously providing the public compensation in the event of a catastrophic nuclear incident"). The preservation of that balance through application of a federal standard of care is entirely

consistent with the federal policies underlying the Price-Anderson Act and presents no conflict with the other circuit court which has had occasion to address the issue. *In re TMI,* 940 F.2d at 859-60.[19] The question is not otherwise worthy of this Court's review.

3. The Result Below Is Not A Departure From Accepted Analyses And Conclusions Regarding Use Of Legislative Prescriptions As The Standard Of Care In Tort; It Does Not Warrant Review.

The district court's analysis of the duty owed under state law began with the thoughtful consideration of the policy reasons for imposing a duty in the first place. *O'Conner*, 748 F. Supp. at 677, Pet. App. at 8d-9d. The district court then determined that the Federal Permissible Dose Limits were specifically designed to establish standards that adequately protect workers "against unreasonable risk of harm." *Id. See also Coley*, 768 F. Supp. at 627 (federal dose limits are based on the existing

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19. Both the federal district courts and the state appellate courts that have engaged in the "consistency" analysis required by 42 U.S.C. § 2014(hh) have come to the same conclusion. *In re TMI Litigation Cases Consolidated II*, No. 88-1452 (M.D. Pa. Feb. 18, 1994) (both the statutory mandate in 42 U.S.C. § 2014(hh), and preemption analysis, require that any state standard of care yield to the federal regulation); *Coley v. Commonwealth Edison*, 768 F. Supp. 625, 629 (N.D. Ill. 1991) ("a . . . state rule setting a broader standard of care could disturb the regulatory scheme established to balance the need for protection and clarity. Since the regulatory scheme governing the nuclear power industry indicates a paramount federal interest, such a state rule must be rejected as contrary to the Price-Anderson Act."); *O'Conner*, 748 F. Supp. at 678, Pet. App. at 12d ("If the application of Illinois law does not result in the adoption of the federal permissible dose limits as the duty owed by the Defendants . . . Illinois law would be inconsistent with federal law and that federal law would have to take precedence."); *Hennessy v. Commonwealth Edison Co.*, 764 F. Supp. 495, 501 (N.D. Ill. 1991) (following *O'Conner*); *Jurka v. Commonwealth Edison Co.*, No. 88C7852 (N.D. Ill. Aug. 9, 1990) (same).

national and international consensus regarding the levels of radiation at which no appreciable bodily injury was expected); *Johnston v. United States*, 597 F. Supp. 374, 424 (D. Kan. 1984) (permissible dose defined as the dose that is not expected to cause appreciable bodily injury to those exposed); *Akins*, 12 Cal. App. 4th 208, 8 Cal. Rpt. 2d 785 (3d Dist. 1992) *rev. dismissed*, 28 Cal. Rptr.2d 150, 868 P.2d 905 (Cal. 1994) (NRC conservatively set permissible dose limits so that no injury will occur unless the limits are exceeded by a significant multiple).

Relying on sound Illinois precedent explicitly adopting the Restatement (Second) of Torts § 286,[20] the District Court correctly held that, absent preemption, Illinois law would adopt the Federal Permissible Dose Limits as the standard of care because each of the four section 286 elements applied to this case. *O'Conner*, 748 F. Supp. at 677, Pet. App. at 10d-11d. *See also Hennessy*, 764 F. Supp. at 501 (Federal Permissible Dose Limits governing internal exposure constitutes standard of care; compliance with same conclusively establishes standard of care was met); *Coley*, 768 F. Supp. at 625 (adoption of the Federal Dose Limits are both reasonable and consistent with Illinois law).

There is nothing novel in adopting the minimum standard prescribed by legislation as the standard of care as a matter of law. The Restatement provides that:

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20. Restatement (Second) of Torts 286 provides that:

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

(a) to protect a class of persons which includes the one whose interest is invaded, and
(b) to protect the particular interest which is invaded, and
(c) to protect that interest against the kind of harm that has resulted, and
(d) to protect that interest against the particular hazard from which the harm results.

> Where there are no . . . special circumstances, the minimum standard prescribed by the legislation or regulation may be accepted . . . by the court as a matter of law, as sufficient for the occasion.

Restatement (Second) of Torts § 288C cmt. a. Similarly, leading tort commentators have recognized:

> Where there is a normal situation, clearly identical with that contemplated by the statute or regulation, it . . . can be ruled as a matter of law that an actor has done his full duty by complying with the statute and nothing more is required.

W.P. Keeton, Prosser and Keeton on the Law of Torts § 36, at 233 (5th ed. 1984). *Accord 2 F. Harper & F. James, The Law of Torts* § 17.6, at 1014 (1956) ("conformity to the legislative standard . . . may so clearly constitute due care under the circumstances of any given case that the court will decide it does as a matter of law"). *See, e.g., Hughes v. Ford Motor Co.*, 677 F. Supp. 76, 84 (D. Conn. 1987) (federal regulations requiring seat belts provided the relevant common-law standard, requiring summary judgment against claim that automobile should have had air bags); *Salvatore v. Cunningham*, 305 Md. 421, 425-30, 505 A.2d 102, 104-06 (1986) (state statute governing installation of smoke detectors defines extent of landlord's common-law duty); *Josephson v. Meyers*, 180 Conn. 302, 307-08, 429 A.2d 877, 880-81 (1980) (bus operator who followed all statutory procedures not liable as a matter of law for passenger's injuries); *Jones v. Hittle Service, Inc.*, 219 Kan. 627, 635, 549 P.2d 1383, 1390-91 (1976) (bulk supplier's adherence to statute regarding odorization of natural gas required entry of summary judgment against claim that gas was defective for being insufficiently odorized).

This is the correct decision as a matter of policy. In a routine negligence case, jurors are able to rely on their life experience to determine what a reasonable person

would do under the circumstances. But no jury can be counted on to have experience or expertise upon which to decide the highly technical issue of what amount of radiation exposure should be allowed for a nuclear worker. Nor would a Court.

> [T]he regulation of nuclear energy is an exacting science which requires exacting standards. In other words, nuclear power plants need precise guidelines regulating what is allowable exposure to radiation so that they can place workers in radioactive areas when necessary without the expectation that the worker will be injured or that the power company will incur liability every time a worker receives a low dose of radiation.

O'Conner, 748 F. Supp. at 676, Pet. App. at 7d.

> This Court is certainly ill-equipped to second guess those scientists by setting different standards of safety in these tort suits . . . this Court readily adopts these exposure standards.

Johnston v. United States, 597 F. Supp. at 391-92.

However, whether or not the law of Illinois would apply the federal regulatory standards governing permissible exposure of workers in nuclear power plants as the standard of care or as evidence of the standard of care as a matter of state law is not an issue warranting this Court's review. The question is even moot, since petitioners do not seek review of the decision below excluding their sole expert on duty owed and causation. Consequently, this case could not have been submitted to a jury under any conceivable state law standard of care.

The selection of the duty owed is governed by the required preemption and rules of decision analyses, and not by the law of Illinois. Whether or not the standard applied in *Darling v. Charleston Hospital*, 33 Ill.2d 326, 211 N.E.2d 253 (1965), or the approach suggested in the Restatement (Second) of Torts 286, or the analysis of

Rucker v. Norfolk & Western Railway Co., 77 Ill.2d 434, 396 N.E.2d 534 (1979), were applied under Illinois state law, the ultimate result turns on whether a state tort standard would conflict or be inconsistent with the federal law. The Seventh Circuit correctly determined that the federal regulations preempt any state standard which would be contrary to the Federal Permissible Dose Limits.

Because that determination is fully in accord with prior decisions of this Court and every other court to have addressed this issue, it need not be reviewed.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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APPENDIX

42 U.S.C. § 2012. Congressional findings

The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

(b) Repealed. Publ. L. 88-489, § 1, Aug. 26, 1964, 78 Stat. 602.

(c) The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

(f) The necessity for protection against possible interstate damage occurring from the operation of facilities for the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this chapter.

(g) Funds of the United States may be provided for the development and use of atomic energy under conditions which will provide for the common defense and security and promote the general welfare.

(h) Repealed. Pub. L. 88-489, § 2, Aug. 26, 1964, 78 Stat. 602.

(i) In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

42 U.S.C. § 2013. Purpose of chapter

It is the purpose of this chapter to effectuate the policies set forth above by providing for –

(a) a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress;

(b) a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress;

(c) a program for Government control of the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare, and to provide continued assurance of the Government's ability to enter into and enforce agreements with nations or groups of nations for the control of special nuclear materials and atomic weapons;

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public;

(e) a program of international cooperation to promote the common defense and security and to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defense and security will permit; and

(f) a program of administration which will be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation, which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate.

42 U.S.C. § 2014. Definitions

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

(a) The term "agency of the United States" means the executive branch of the United States, or any Government agency, or the legislative branch of the United States, or any agency, committee, commission, office, or other establishment in the legislative branch, or the judicial branch of the United States, or any office, agency, committee, commission, or other establishment in the judicial branch.

(b) The term "agreement for cooperation" means any agreement with another nation or regional defense organization authorized or permitted by sections 2074, 2077, 2094, 2112, 2121(c), 2133, 2134, or 2164 of this title, and made pursuant to section 2153 of this title.

(c) The term "atomic energy" means all forms of energy released in the course of nuclear fission or nuclear transformation.

(d) The term "atomic weapon" means any device utilizing atomic energy, exclusive of the means for transporting or propelling the device (where such means is a separable and divisible part of the device), the

principal purpose of which is for use as, or for development of, a weapon, a weapon prototype, or a weapon test device.

(e) The term "byproduct material" which means (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

(f) The term "Commission" means the Atomic Energy Commission.

(g) The term "common defense and security" means the common defense and security of the United States.

(h) The term "defense information" means any information in any category determined by any Government agency authorized to classify information, as being information respecting, relating to, or affecting the national defense.

(i) The term "design" means (1) specifications, plans, drawings, blueprints, and other items of like nature; (2) the information contained therein; or (3) the research and development data pertinent to the information contained therein.

(j) The term "extraordinary nuclear occurrence" means any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines to be substantial, and which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines has resulted or will probably result in substantial damages to persons offsite or property offsite. Any determination by the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, that such an event has, or has not, occurred shall be final and conclusive, and no other official or any

court shall have power or jurisdiction to review any such determination. The Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, shall establish criteria in writing setting forth the basis upon which such determination shall be made. As used in this subsection, "offsite" means away from "the location" or "the contract location" as defined in the applicable Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, indemnity agreement, entered into pursuant to section 2210 of this title.

(k) The term "financial protection" means the ability to respond in damages for public liability and to meet the costs of investigating and defending claims and settling suits for such damages.

(l) The term "Government agency" means any executive department, commission, independent establishment, corporation, wholly or partly owned by the United States of America which is an instrumentality of the United States, or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government.

(m) The term "indemnitor" means (1) any insurer with respect to this obligation under a policy of insurance furnished as proof of financial protection; (2) any licensee, contractor or other person who is obligated under any other form of financial protection, with respect to such obligations; and (3) the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, with respect to any obligation undertaken by it in indemnity agreement entered into pursuant to section 2210 of this title.

(n) The term "international arrangement" means any international agreement hereafter approved by the Congress or any treaty during the time such agreement or treaty is in full force and effect, but does not include any agreement for cooperation.

(o) The term "Joint Committee" means the Joint Committee on Atomic Energy.

(p) The term "licensed activity" means an activity licensed pursuant to this chapter and covered by the provisions of section 2210(a) of this title.

(q) The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material: *Provided, however* That as the term is used in section 2210(l) of this title, it shall include any such occurrence outside the United States: *And provided further*, That as the term is used in section 2210(c) of this title, it shall include any such occurrence outside both the United States and any other nation if such occurrence arises out of or results from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or by-product material licensed pursuant to subchapters, V, VI, VII, and IX of this chapter, which is used in connection with the operation of a licensed stationary production or utilization facility or which moves outside the territorial limits of the United States in transit from one person licensed by the Nuclear Regulatory Commission to another person licensed by the Nuclear Regulatory Commission.

(r) The term "operator" means any individual who manipulates the controls of a utilization or production facility.

(s) The term "person" means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Commission, any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.

(t) The term "person indemnified" means (1) with respect to a nuclear incident occurring within the United States or outside the United States as the term is used in section 2210(c) of this title, and with respect to any nuclear incident in connection with the design, development, construction, operation, repair, maintenance, or use of the nuclear ship Savannah, the person with whom an indemnity agreement is executed or who is required to maintain financial protection, and any other person who may be liable for public liability or (2) with respect to any other nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any contract with the Secretary of Energy or any project to which indemnification under the provisions of section 2210(d) of this title has been extended or under any subcontract, purchase order, or other agreement, or any tier, under any such contract or project.

(u) The term "produce," when used in relation to special nuclear material, means (1) to manufacture, make, produce, or refine special nuclear material; (2) to separate special nuclear material from other substances in which such material may be contained; or (3) to make or to produce new special nuclear material.

(v) The term "production facility" means (1) any equipment or device determined by rule of the Commission to be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

(w) The term "public liability" means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or a precautionary evacuation), except:

(i) claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; and (iii) whenever used in subsections (a), (c), and (k) of section 2210 of this title, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs. "Public liability" also includes damage to property of persons indemnified: *Provided*, That such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

(x) The term "research and development" means (1) theoretical analysis, exploration, or experimentation; or (2) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes.

(y) The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title.

(z) The term "source material" means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

(aa) The term "special nuclear material" means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the

Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

(bb) The term "United States" when used in a geographical sense includes all territories and possessions of the United States, the Canal Zone and Puerto Rico.

(cc) The term "utilization facility" means (1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

(dd) The terms "high level radioactive waste" and "spent nuclear fuel" have the meanings given such terms in section 10101 of this title.

(ee) The term "transuranic waste" means material contaminated with elements that have an atomic number greater than 92, including neptunium, plutonium, americium, and curium, and that are in concentrations greater than 10 nanocuries per gram, or in such other concentrations as the Nuclear Regulatory Commission may prescribe to protect the public health and safety.

(ff) The term "nuclear waste activities", as used in section 2210 of this title, means activities subject to an agreement of indemnification under subsection (d) of such section, that the Secretary of Energy is authorized to undertake, under this chapter or any other law, involving the storage, handling, transportation, treatment, or disposal of, or research and development on,

spent nuclear fuel, high-level radioactive waste, or transuranic waste, including (but not limited to) activities authorized to be carried out under the Waste Isolation Pilot Project under section 213 of Public Law 96-164 (93 Stat. 1265).

(gg) The term "precautionary evacuation" means an evacuation of the public within a specified area near a nuclear facility, or the transportation route in the case of an accident involving transportation of source material, special nuclear material, byproduct material, high-level radioactive waste, spent nuclear fuel, or transuranic waste to or from a production or utilization facility, if the evacuation is –

> (1) the result of any event that is not classified as a nuclear incident but that poses imminent danger of bodily injury or property damage from the radiological properties of source material, special nuclear material, byproduct material, high-level radioactive waste, spent nuclear fuel, or transuranic waste, and causes of evacuation; and
>
> (2) initiated by an official of a State or a political subdivision of a State, who is authorized by State law to initiate such an evacuation and who reasonably determined that such an evacuation was necessary to protect the public health and safety.

(hh) The term "public liability action", as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

(jj) [1] LEGAL COSTS. – As used in section 2210 of this title, the term "legal costs" means the costs incurred

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1. So in original. There is no subsec. (ii).

by a plaintiff or a defendant in initiating, prosecuting, investigation, settling, or defending claims or suits for damage arising under such section.

42 U.S.C. § 2210. Indemnification and limitation of liability

(a) Requirement of financial protection for licensees

Each license issued under section 2133 or 2134 of this title and each construction permit issued under section 2235 of this title shall, and each license issued under section 2073, 2093, or 2111 of this title may, for the public purposes cited in section 2012(i) of this title, have as a condition of the license a requirement that the licensee have and maintain financial protection of such type and in such amounts as the Nuclear Regulatory Commission (in this section referred to as the "Commission") is in the exercise of its licensing and regulatory authority and responsibility shall require in accordance with subsection (b) of this section to cover public liability claims. Whenever such financial protection is required, it may be a further condition of the license that the licensee execute and maintain an indemnification agreement in accordance with subsection (c) of this section. The Commission may require, as a further condition or issuing a license, that an applicant waiver any immunity from public liability conferred by Federal or State law.

(b) Amount and type of financial protection for licensees

(1) The amount of primary financial protection required shall be the amount of liability insurance available from private sources, except that the Commission may establish a lesser amount on the basis of criteria set forth in writing, which it may revise from time to time, taking into consideration such factors as the following: (A) the costs and terms of private insurance, (B) the type, size, and location of the licensed activity and other factors pertaining to the hazard, and

(C) the nature and purpose of the licensed activity: *Provided*, That for facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the amount of primary financial protection required shall be the maximum amount available at reasonable cost and on reasonable terms from private sources (excluding the amount of private liability insurance available under the industry retrospective rating plan required in this subsection). Such primary financial protection may include private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination of such measures and shall be subject to such terms and conditions as the Commission may, by rule, regulation, or order, prescribe. The Commission shall require licensees that are required to have and maintain primary financial protection equal to the maximum amount of liability insurance available from private sources to maintain, in addition to such primary financial protection, private liability insurance available under an industry retrospective rating plan providing for premium charges deferred in whole or major part until public liability from a nuclear incident exceeds or appears likely to exceed the level of the primary financial protection required of the licensee involved in the nuclear incident: *Provided*, That such insurance is available to, and required of, all of the licensees of such facilities without regard to the manner in which they obtain other types or amounts of such primary financial protection: *And provided further*, That the maximum amount of the standard deferred premium that may be charged a licensee following any nuclear incident under such a plan shall not be more than $63,000,000 (subject to adjustment for inflation under subsection (t) of this section), but not more than $10,000,000 in any 1 year, for each facility for which such licensee is required to maintain the maximum amount of primary financial protection: *And provided further*, That the amount which may be charged a licensee following any nuclear

incident shall not exceed the licensee's pro rata share of the aggregate public liability claims and costs (excluding legal costs subject to subsection (o)(1)(D) of this section, payment of which has not been authorized under such subsection) arising out of the nuclear incident. Payment of any State premium taxes which may be applicable to any deferred premium provided for in this chapter shall be the responsibility of the licensee and shall not be included in the retrospective premium established by the Commission.

(2) (A) The Commission may, on a case by case basis, assess annual deferred premium amounts less than the standard annual deferred premium amount assessed under paragraph (1) —

(i) for any facility, if more than one nuclear incident occurs in any one calendar year; or

(ii) for any licensee licensed to operate more than one facility, if the Commission determines that the financial impact of assessing the standard annual deferred premium amount under paragraph (1) would result in the undue financial hardship to such licensee or the ratepayers of such licensee.

(B) In the event that the Commission assesses a lesser annual deferred premium amount under subparagraph (A), the Commission shall require payment of the difference between the standard annual deferred premium assessment under paragraph (1) and any such lesser annual deferred premium assessment within a reasonable period of time, with interest at a rate determined by the Secretary of the Treasury on the basis of the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the date that the standard annual deferred premium assessment under paragraph (1) would become due.

(3) The Commission shall establish such requirements as are necessary to assure availability of funds to

meet any assessment of deferred premiums within a reasonable time when due, and may provide reinsurance or shall otherwise guarantee the payment of such premiums in the event it appears that the amount of such premiums will not be available on a timely basis through the resources of private industry and insurance. Any agreement by the Commission with a licensee or indemnitor to guarantee the payment of deferred premiums may contain such terms as the Commission deems appropriate to carry out the purposes of this section and to assure reimbursement to the Commission for its payments made due to the failure of such licensee or indemnitor to meet any of its obligations arising under or in connection with financial protection required under this subsection including without limitation terms creating liens upon the licensed facility and the revenues derived therefrom or any other property or revenues of such licensee to secure such reimbursement and consent to the automatic revocation of any license.

(4) (A) In the event that the funds available to pay valid claims in any year are insufficient as a result of the limitation on the amount of deferred premiums that may be required of a licensee in any year under paragraph (1) or (2), or the Commission is required to make reinsurance or guaranteed payments under paragraph (3), the Commission shall, in order to advance the necessary funds –

(i) request the Congress to appropriate sufficient funds to satisfy such payments; or

(ii) to the extent approved in appropriation Acts, issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be agreed to by the Commission and the Secretary of the Treasury.

(B) Except for funds appropriated for purposes of making reinsurance or guaranteed payments under

paragraph (3), any funds appropriated under subparagraph (A)(i) shall be repaid to the general fund of the United States Treasury from amounts made available by standard deferred premium assessments, with interest at a rate determined by the Secretary of the Treasury on the basis of the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the date that the funds appropriated under such subparagraph are made available.

(C) Except for funds appropriated for purposes of making reinsurance or guaranteed payments under paragraph (3), redemption of obligations issued under subparagraph (A)(ii) shall be made by the Commission from amounts made available by standard deferred premium assessments. Such obligations shall bear interest at a rate determined by the Secretary of the Treasury by taking into consideration the average market yield on outstanding marketable obligations to the United States of comparable maturities during the month preceding the issuance of the obligations under this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such purpose the Secretary of the Treasury may use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, and the purposes for which securities may be issued under such chapter are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by the Secretary of the Treasury under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

(c) Indemnification of licenses by Nuclear Regulatory Commission

The Commission shall, with respect to licenses issued between August 30, 1954, and August 1, 2002, for which it requires financial protection of less than $560,000,000, agree to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000 excluding costs of investigating and and settling claims and defending suits for damage: *Provided, however*, That this amount of indemnity shall be reduced by the amount that the financial protection required shall exceed $60,000,000. Such a contract of indemnification shall cover public liability arising out of or in connection with the licensed activity. With respect to any production or utilization facility for which a construction permit is issued between August 30, 1954, and August 1, 2002, the requirements of this subsection shall apply to any license issued for such facility subsequent to August 1, 2002.

(d) Indemnification of contracts by Department of Energy

(1) (A) In addition to any other authority the Secretary of Energy (in this section referred to as the "Secretary") may have, the Secretary shall, until August 1, 2002, enter into agreements of indemnification under this subsection with any person who may conduct activities under a contract with the Department of Energy that involve the risk of public liability and that are not subject to financial protection requirements under subsection (b) of this section or agreements of indemnification under subsection (c) or (k) of this section.

(B)(i)(I) Beginning 670 days after August 20, 1988, agreements of indemnification under subparagraph (A) shall be the exclusive means of indemnification for public liability arising from activities described in such subparagraph, including activities conducted under a contract that contains an indemnification clause under Public Law 85-804 [50 U.S.C 1431 et seq.] entered into between August 1, 1987, and August 20, 1988.

(II) The Secretary may incorporate in agreements of indemnification under subparagraph (A) the provisions relating to the waiver of any issue or defense as to charitable or governmental immunity authorized in subsection (n)(1) of this section to be incorporated in agreements of indemnification. Any such provisions incorporated under this subclause shall apply to any nuclear incident arising out of nuclear waste activities subject to an agreement of indemnification under subparagraph (A).

(ii) Public liability arising out of nuclear waste activities subject to an agreement of indemnification under subparagraph (A) that are funded by the Nuclear Waste Fund established in section 10222 of this title shall be compensated from the Nuclear Waste Fund in an amount not to exceed the maximum amount of financial protection required of licensees under subsection (b) of this section.

(2) In agreements of indemnification entered into under paragraph (1), the Secretary may require the contractor to provide and maintain financial protection of such a type and in such amounts as the Secretary shall determine to be appropriate to cover public liability arising out of or in connection with the contractual activity, and shall indemnify the persons indemnified against such claims above the amount of the financial protection required, to the full extent of the aggregate public liability of the persons indemnified for each nuclear incident, including such legal costs of the contractor as are approved by the Secretary.

(3) (A) Notwithstanding paragraph (2), if the maximum amount of financial protection required of licensees under subsection (b) of this section is increased by the Commission, the amount of indemnity, together with any financial protection required of the contractor, shall at all times remain equal to or greater than the maximum amount of financial protection required of licensees under subsection (b) of this section.

(B) The amount of indemnity provided contractors under this subsection shall not, at any time, be reduced in the event that the maximum amount of financial protection required of licensees is reduced.

(C) All agreements of indemnification under which the Department of Energy (or its predecessor agencies) may be required to indemnify any person, shall be deemed to be amended, on August 20, 1988, to reflect the amount of indemnity for public liability and any applicable financial protection required of the contractor under this subsection on August 20, 1988.

(4) Financial protection under paragraph (2) and indemnification under this section for any Department of Energy demonstration reactor licensed by the Commission under section 5842 of this title.

(5) In the case of nuclear incidents occurring outside the United States, the amount of the indemnity provided by the Secretary under this subsection shall not exceed $100,000,000.

(6) The provisions of this subsection may be applicable to lump sum as well as cost type contracts and to contracts and projects financed in whole or in part by the Secretary.

(7) A contractor with whom an agreement of indemnification has been executed under paragraph (1)(A) and who is engaged in activities connected with the underground detonation of a nuclear explosive device shall be liable, to the extent so indemnified under this subsection, for injuries or damage sustained as a result of such detonation in the same manner and to the same extent as would a private person acting as principal, and

no immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar such liability.

(e) Limitation on aggregate public liability

(1) The aggregate public liability for a single nuclear incident of persons indemnified, including such legal costs as are authorized to be paid under subsection (o)(1)(D) of this section, shall not exceed –

(A) in the case of facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the maximum amount of financial protection required of such facilities under subsection (b) of this section (plus any surcharge assessed under subsection (o)(1)(E) of this section);

(B) in the case of contractors with whom the Secretary has entered into an agreement of indemnification under subsection (d) of this section, the maximum amount of financial protection required under subsection (b) of this section or the amount of indemnity and financial protection that may be required under paragraph (3) of subsection (d) of this section, whichever amount is more; and

(C) in the case of all other licensees of the Commission required to maintain financial protection under this section –

(i) $500,000,000, together with the amount of financial protection required of the licensee; or

(ii) if the amount of financial protection required of the licensee exceeds $60,000,000, $560,000,000 or the amount of financial protection required of the licensee, whichever amount is more.

(2) In the event of a nuclear incident involving damages in excess of the amount of aggregate public liability under paragraph (1), the Congress will thoroughly review the particular incident in accordance with the procedures set forth in subsection (i) of this section and will in accordance with such procedures, take whatever action is determined to be necessary (including approval of appropriate compensation plans and appropriation of funds) to provide full and prompt compensation to the public for all public liability claims resulting from a disaster of such magnitude.

(3) No provision of paragraph (1) may be construed to preclude the Congress from enacting a revenue measure, applicable to licensees of the Commission required to maintain financial protection pursuant to subsection(b) of this section, to fund any action undertaken pursuant to paragraph (2).

(4) With respect to any nuclear incident occurring outside of the United States to which an agreement of indemnification entered into under the provisions of subsection (d) of this section is applicable, such aggregate public liability shall not exceed the amount of $100,000,000, together with the amount of financial protection required of the contractor.

(f) Collection of fees by Nuclear Regulatory Commission

The Commission or the Secretary, as appropriate, is authorized to collect a fee from all persons with whom an indemnification agreement is executed under this section. This fee shall be $30 per year per thousand kilowatts of thermal energy capacity for facilities licensed under section 2133 of this title: *Provided*, That the Commission or the Secretary, as appropriate, is authorized to reduce the fee for such facilities in reasonable relation to increases in financial protection required above a level of $60,000,000. For facilities licensed under section 2134 of this title, and for construction permits under section 2235 of this title, the Commission

is authorized to reduce the fee set forth above. The Commission shall establish criteria in writing for determination of the fee for facilities licensed under section 2134 of this title, taking into consideration such factors as (1) the type, size, and location of facility involved, and other factors pertaining to the hazard, and (2) the nature and purpose of the facility. For other licenses, the Commission shall collect such nominal fees as it deems appropriate. No fee under this subsection shall be less than $100 per year.

(g) Use of services of private insurers

In administering the provisions of this section, the Commission or the Secretary, as appropriate, shall use, to the maximum extent practicable, the facilities and services of private insurance organizations, and the Commission or the Secretary, as appropriate, may contract to pay a reasonable compensation for such services. Any contract made under the provisions of this subsection may be made without regard to the provisions of section 5 of title 41 upon a showing by the Commission or the Secretary, as appropriate, that advertising is not reasonably practicable and advance payments may be made.

(h) Conditions of agreements of indemnification

The agreement of indemnification may contain such terms as the Commission or the Secretary, as appropriate, deems appropriate to carry out the purposes of this section. Such agreement shall provide that, when the Commission or the Secretary, as appropriate, makes a determination that the United States will probably be required to make indemnity payments under this section, the Commission or the Secretary, as appropriate, shall collaborate with any person indemnified and may approve the payment of any claim under the agreement of indemnification, appear through the Attorney General on behalf of the person indemnified, take charge of such

action, and settle or defend any such action. The Commission or the Secretary, as appropriate, shall have final authority on behalf of the United States to settle or approve the settlement of any such claim on a fair and reasonable basis with due regard for the purposes of this chapter. Such settlement shall not include expenses in connection with the claim incurred by the person indemnified.

(i) **Compensation plans**

(1) After any nuclear incident involving damages that are likely to exceed the applicable amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1) of this section, the Secretary or the Commission,[2] as appropriate, shall –

(A) make a survey of the causes and extent of damage; and

(B) expeditiously submit a report setting forth the results of such survey to the Congress, to the Representatives of the affected districts, to the Senators of the affected States, and (except for information that will cause serious damage to the national defense of the United States) to the public, to the parties involved, and to the courts.

(2) Not later than 90 days after any determination by a court, pursuant to subsection (o) of this section, that the public liability from a single nuclear incident may exceed the applicable amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1) of this section the President shall submit to the Congress –

(A) an estimate of the aggregate dollar value of personal injuries and property damage that arises from the nuclear incident and exceeds the amount

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2. So in original. Probably should be "Commission,".

of aggregate public liability under subsection (e)(1) of this section;

(B) recommendations for additional sources of funds to pay claims exceeding the applicable amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1) of this section, which recommendations shall consider a broad range of possible sources of funds (including possible revenue measures on the sector of the economy, or on any other class, to which such revenue measures might be applied);

(C) 1 or more compensation plans, that either individually or collectively shall provide for full and prompt compensation for all valid claims and contain a recommendation or recommendations that funds be allocated or set aside for the payment of claims that may arise as a result of latent injuries that may not be discovered until a later date; and

(D) any additional legislative authorities necessary to implement such compensation plan or plans.

(3) (A) Any compensation plan transmitted to the Congress pursuant to paragraph (2) shall bear an identification number and shall be transmitted to both Houses of Congress on the same day and to each House while it is in session.

(B) The provisions of paragraphs (4) through (6) shall apply with respect to consideration in the Senate of any compensation plan transmitted to the Senate pursuant to paragraph (2).

(4) No such compensation plan may be considered approved for purposes of subsection (e)(2) of this section unless between the date of transmittal and the end of the first period of sixty calendar days of continuous session of Congress after the date on which such action is

transmitted to the Senate, the Senate passes a resolution described in paragraph 6[3] of this subsection.

(5) For the purpose of paragraph (4) of this subsection –

(A) continuity of session is broken only by an adjournment of Congress sine die; and

(B) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the sixty-day calendar period.

(6) (A) This paragraphs is enacted –

(i) as an exercise of the rulemaking power of the Senate and as such it is deemed a part of the rules of the Senate, but applicable only with respect to the procedure to be followed in the Senate in the case of resolutions described by subparagraph (B) and it supersedes other rules only to the extent that it is inconsistent therewith; and

(ii) with full recognition of the constitutional right of the Senate to change the rules at any time, in the same manner and to the same extent as in the case of any other rule of the Senate.

(B) For purposes of this paragraph, the terms "resolution" means only a joint resolution of the Congress the matter after the resolving clause of which is as follows: "That the approves the Congress on , 19 .", the first blank space therein being filled with the name of the resolving House and the other blank spaces being appropriately filled; but does not include a resolution which specifies more than one compensation plan.

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3. So in original. Probably should be "(6)".

(C) A resolution once introduced with respect to a compensation plan shall immediately be referred to a committee (and all resolutions with respect to the same compensation plan shall be referred to the same committee) by the President of the Senate.

(D) (i) If the committee of the Senate to which a resolution with respect to a compensation plan has been referred has not reported it at the end of twenty calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of such resolution or to discharge the committee from further consideration with respect to such compensation plan which has been referred to the committee.

(ii) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same compensation plan), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(iii) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same compensation plan.

(E) (i) When the committee has reported, or has been discharged from further consideration of, a resolution, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the

consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(ii) Debate on the resolution referred to in clause (i) of this subparagraph shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing such resolution. A motion further to limit debate shall not be debatable. An amendment to, or motion to recommit, the resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which such resolution was agreed to or disagreed to.

(F) (i) Motions to postpone, made with respect to the discharge from committee, or the consideration of a resolution or motions to proceed to the consideration of other business, shall be decided without debate.

(ii) Appeals from the decision of the Chair relating to the application of the rules of the Senate to the procedures relating to a resolution shall be decided without debate.

(j) Contracts in advance of appropriations

In administering the provisions of this section, the Commission or the Secretary, as appropriate, may make contracts in advance of appropriations and incur obligations without regard to sections 1341, 1342, 1349, 1350, and 1351, and subchapter II of chapter 15, of title 31.

(k) Exemption from financial protection requirement for nonprofit educational institutions

With respect to any license issued pursuant to section 2073, 2093, 2111, 2134(a), or 2134(c) of this title, for the conduct of educational activities to a person

found by the Commission to be a nonprofit educational institution, the Commission shall exempt such licensee from the financial protection requirement of subsection (a) of this section. With respect to licenses issued between August 30, 1954, and August 1, 2002, for which the Commission grants such exemption:

(1) the Commission shall agree to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from public liability in excess of $250,000 arising from nuclear incidents. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000 including such legal costs of the licensee as are approved by the Commission;

(2) such contracts of indemnification shall cover public liability arising out of or in connection with the licensed activity; and shall include damage to property of persons indemnified, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs; and

(3) such contracts of indemnification, when entered into with a licensee having immunity from public liability because it is a State agency, shall provide also that the Commission shall make payments under the contract on account of activities of the licensee in the same manner and to the same extent as the Commission would be required to do if the licensee were not such a State agency.

Any licensee may waive an exemption to which it is entitled under this subsection. With respect to any production or utilization facility for which a construction permit is issued between August 30, 1954, and August 1, 2002, the requirements of this subsection shall apply to any license issued for such facility subsequent to August 1, 2002.

(l) Presidential Commission on catastrophic nuclear accidents

(1) Not later than 90 days after August 20, 1988, the President shall establish a commission (in this subsection referred to as the "study commission") in accordance with the Federal Advisory Committee Act (5 U.S.C. App.) to study means of fully compensating victims of a catastrophic nuclear accident that exceeds the amount of aggregate public liability under subsection (e)(1) of this section.

(2) (A) The study commission shall consist of not less than 7 and not more than 11 members, who –

(i) shall be appointed by the President, and

(ii) shall be representative of a broad range of views and interests.

(B) The members of the study commission shall be appointed in a manner that ensures that not more than a mere majority of the members are of the same political party.

(C) Each member of the study commission shall hold office until the termination of the study commission, but may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

(D) Any vacancy in the study commission shall be filled in the manner in which the original appointment was made.

(E) The President shall designate one of the members of the study commission as chairperson, to serve at the pleasure of the President.

(3) The study commission shall conduct a comprehensive study of appropriate means of fully compensating victims of a catastrophic nuclear accident that exceeds the amount of aggregate public liability under subsection (e)(1) of this section, and shall submit to the Congress a final report setting forth –

(A) recommendations for any changes in the laws and rules governing the liability or civil procedures that are necessary for the equitable, prompt, and efficient resolution and payment of all valid damage claims, including the advisability of adjudicating public liability claims through an administrative agency instead of the judicial system.

(B) recommendations for any standards or procedures that are necessary to establish priorities for the hearing, resolution, and payment of claims when awards are likely to exceed the amount of funds available within a specific time period; and

(C) recommendations for any special standards or procedures necessary to decide and pay claims for latent injuries caused by the nuclear incident.

(4) (A) The chairperson of the study commission may appoint and fix the compensation of the staff of such persons as may be necessary to discharge the responsibilities of the study commission, subject to the applicable provisions of the Federal Advisory Committee Act (5 U.S.C. App.) and title 5.

(B) To the extent permitted by law and requested by the chairperson of the study commission, the Administrator of General Services shall provide the study commission with necessary administrative services, facilities, and support on a reimbursable basis.

(C) The Attorney General, the Secretary of Health and Human Services, and the Director of the Federal Emergency Management Agency shall, to the extent permitted by law and subject to the availability of funds, provide the study commission with such facilities, support, funds and services, including staff, as may be necessary for the effective performance of the functions of the study commission.

(D) The study commission may request any Executive agency to furnish such information, advice, or assistance as it determines to be necessary to carry out

its functions. Each such agency is directed, to the extent permitted by law, to furnish such information, advice or assistance upon request by the chairperson of the study commission.

(E) Each member of the study commission may receive compensation at the maximum rate prescribed by the Federal Advisory Committee Act (5 U.S.C. App.) for each day such member is engaged in the work of the study commission. Each member may also receive travel expenses, including per diem in lieu of subsistence under sections 5702 and 5703 of title 5.

(F) The functions of the President under the Federal Advisory Committee Act (5 U.S.C. App.) that are applicable to the study commission, except the function of reporting annually to the Congress, shall be performed by the Administrator of General Services.

(5) The final report required in paragraph (3) shall be submitted to the Congress not later than the expiration of the 2-year period beginning on August 20, 1988.

(6) The study commission shall terminate upon the expiration of the 2-month period beginning on the date on which the final report required in paragraph (3) is submitted.

(m) Coordinated procedures for prompt settlement of claims and emergency assistance

The Commission or the Secretary, as appropriate, is authorized to enter into agreements with other indemnitors to establish coordinated procedures for the prompt handling, investigation, and settlement of claims for public liability. The Commission or the Secretary, as appropriate, and other indemnitors may make payments to, or for the aid of, claimants for the purpose of providing immediate assistance following a nuclear incident. Any funds appropriated to the Commission or the Secretary, as appropriate, shall be available for such payments. Such payments may be made without securing releases, shall not constitute an admission of the

liability of any person indemnified or of any indemnitor, and shall operate as a satisfaction to the extent thereof of any final settlement or judgment.

(n) Waiver of defenses and judicial procedures

(1) With respect to any extraordinary nuclear occurrence to which an insurance policy or contract furnished as proof of financial protection or an indemnity agreement applies and which –

(A) arises out of or results from or occurs in the course of the construction, possession, or operation of a production or utilization facility,

(B) arises out of or results from or occurs in the course of transportation of source material, byproduct material, or special nuclear material to or from a production or utilization facility,

(C) during the course of the contract activity arises out of or results from the possession, operation, or use by a Department of Energy contractor or subcontractor of a device utilizing special nuclear material or byproduct material,

(D) arises out of, results from, or occurs in the course of, the construction, possession, operation of any facility licensed under section 2073, 2093, or 2111 of this title, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection (a) of this section,

(E) arises out of, results from, or occurs in the course of, transportation of source material, byproduct material, or special nuclear material to or from any facility licensed under section 2073, 2093, or 2111 of this title, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection (a) of this section, or

(F) arises out of, results from, or occurs in the course of nuclear waste activities.

the Commission or the Secretary, as appropriate, may incorporate provisions in indemnity agreements with licensees and contractors under this section, and may require provisions to be incorporated in insurance policies or contracts furnished as proof of financial protection, which waive (i) any issue or defense as to conduct of the claimant or fault of persons indemnified, (ii) any issue or defense as to charitable or governmental immunity, and (iii) any issue or defense based on any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. When so incorporated, such waivers shall be judicially enforceable in accordance with their terms by the claimant against the person indemnified. Such waivers shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages, nor shall such waivers apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant. The waivers authorized in this subsection shall, as to indemnitors, be effective only with respect to those obligations set forth in the insurance policies or the contracts furnished as proof of financial protection and in the indemnity agreements. Such waivers shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (i) the terms of insurance policies or contracts furnished as proof of financial protection, or indemnity agreements, and (ii) the limit of liability provisions of subsection (e) of this section.

(2) With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on August 20, 1988) or United States district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States. In any action that is or becomes removable pursuant to this paragraph, a petition for removal shall be filed within the period provided in section 1446 of title 28 or within the 30-day period beginning on August 20, 1988, whichever occurs later.

(3) (A) Following any nuclear incident, the chief judge of the United States district court having jurisdiction under paragraph (2) with respect to public liability actions (or the judicial council of the judicial circuit in which the nuclear incident occurs) may appoint a special caseload management panel (in this paragraph referred to as the "management panel") to coordinate and assign (but not necessarily hear themselves) cases arising out of the nuclear incident, if –

(i) a court, acting pursuant to subsection (o) of this section, determines that the aggregate amount of public liability is likely to exceed the amount of primary financial protection available under subsection (b) of this section (or an equivalent amount n the case of a contractor indemnified under subsection (d) of this section); or

(ii) the chief judge of the United States district court (or the judicial council of the judicial circuit)

determines that cases arising out of the nuclear incident will have an unusual impact on the work of the court.

(B) (i) Each management panel shall consist only of members who are United States district judges or circuit judges.

(ii) Members of a management panel may include any United States district judge or circuit judge of another district court or court of appeals, if the chief judge of such other district court or court of appeals consents to such assignment.

(C) It shall be the function of each management panel –

(i) to consolidate related or similar claims for hearing or trial;

(ii) to establish priorities for the handling of different classes of cases;

(iii) to assign cases to a particular judge or special master;

(iv) to appoint special masters to hear particular types of cases, or particular elements or procedural steps of cases;

(v) to promulgate special rules of court, not inconsistent with the Federal Rules of Civil Procedure, to expedite cases or allow more equitable consideration of claims;

(vi) to implement such other measures, consistent with existing law and the Federal Rules of Civil Procedure, as will encourage the equitable, prompt, and efficient resolution of cases arising out of the nuclear incident; and

(vii) to assemble and submit to the President such data, available to the court, as may be useful in estimating the aggregate damages from the nuclear incident.

(o) Plan for distribution of funds

(1) Whenever the United States district court in the district where a nuclear incident occurs, or the United States District Court for the District of Columbia in case of a nuclear incident occurring outside the United States, determines upon the petition of any indemnitor or other interested person that public liability from a single nuclear incident may exceed the limit of liability under the applicable limit of liability under subparagraph (A), (B), or (C) of subsection (e)(1) of this section:

(A) Total payments made by or for all indemnitors as a result of such nuclear incident shall not exceed 15 per centum of such limit of liability without the prior approval of such court;

(B) The court shall not authorize payments in excess of 165 per centum of such limit of liability unless the court determines that such payments are or will be in accordance with a plan of distribution which has been approved by the court or such payments are not likely to prejudice the subsequent adoption and implementation by the court of a plan of distribution pursuant to subparagraph (C); and

(C) The Commission or the Secretary, as appropriate, shall, and any other indemnitor or other interested person may, submit to such district court a plan for the disposition of pending claims and for the distribution of remaining funds available. Such a plan shall include an allocation of appropriate amounts for personal injury claims, property damage claim, and possible latent injury claims which may not be discovered until a later time and shall include establishment of priorities between claimants and classes of claims, as necessary to insure the most equitable allocation of available funds. Such court shall have all power necessary to approve, disapprove, or modify plans proposed, or to adopt another plan; and to determine the proportionate share of funds available for each claimant. The Commission or the Secretary, as appropriate, any other indemnitor, and

any person indemnified shall be entitled to such orders as may be appropriate to implement and enforce the provisions of this section, including orders limiting the liability of the persons indemnified, orders approving or modifying the plan, orders staying the payment of claims and the execution of court judgments, order apportioning the payments to be made to claimants, and orders permitting partial payments to be made before final determination of the total claims. The orders of such court shall be effective throughout the United States.

(D) A court may authorize payment of only such legal costs as are permitted under paragraph (2) from the amount of financial protection required by subsection (b) of this section.

(E) If the sum of public liability claims and legal costs authorized under paragraph (2) arising from any nuclear incident exceeds the maximum amount of financial protection required under subsection (b) of this section, any licensee required to pay a standard deferred premium under subsection (b)(1) of this section shall, in addition to such deferred premium, be charged such an amount as is necessary to pay a pro rata share of such claims and costs, but in no case more than 5 percent of the maximum amount of such standard deferred premium described in such subsection.

(2) A court may authorize the payment of legal costs under paragraph (1)(D) only if the person requesting such payment has –

(A) submitted to the court the amount of such payment requested; and

(B) demonstrated to the court –

(i) that such costs are reasonable and equitable; and

(ii) that such person has –

(I) litigated in good faith;

(II) avoided unnecessary duplication of effort with that of other parties similarly situated;

(III) not made frivolous claims or defenses; and

(IV) not attempted to unreasonably delay the prompt settlement or adjudication of such claims.

(p) Reports to Congress

(1) The Commission and the Secretary shall submit to the Congress by August 1, 1998, detailed reports concerning the need for continuation or modification of the provisions of this section, taking into account the condition of the nuclear industry, availability of private insurance, and the state of knowledge concerning nuclear safety at that time, among other relevant factors, and shall include recommendations as to the repeal or modification of any of the provisions of this section.

(2) Not later than April 1 of each year, the Commission and the Secretary shall each submit an annual report to the Congress setting forth the activities under this section during the preceding calendar year.

(q) Limitation on awarding of precautionary evacuation costs

No court may award costs of a precautionary evacuation unless such costs constitute a public liability.

(r) Limitation on liability of lessors

No person under a bona fide lease of any utilization or production facility (or part thereof or undivided interest therein) shall be liable by reason or an interest as lessor of such production or utilization facility, for any legal liability arising out of or resulting from a nuclear incident resulting from such facility, unless such facility is in the actual possession and control of such person at the time of the nuclear incident giving rise to such legal liability.

(s) Limitation on punitive damages

No court may award punitive damages in any action with respect to a nuclear incident or precautionary evacuation against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification covering such incident or evacuation.

(t) Inflation adjustment

(1) The Commission shall adjust the amount of the maximum standard deferred premium under subsection (b)(1) of this section not less than once during each 5-year period following August 20, 1988, in accordance with the aggregate percentage change in the Consumer Price Index since –

(A) August 20, 1988, in the case of the first adjustment under this subsection; or

(B) the previous adjustment under this subsection.

(2) For purposes of this subsection, the term "Consumer Price Index" means the Consumer Price Index for all urban consumers published by the Secretary of Labor.

10 C.F.R. § 20.101 Radiation dose standards for individuals in restricted areas.

(a) In accordance with the provisions of § 20.102(a), and except as provided in paragraph (b) of this section, no licensee shall possess, use, or transfer licensed material in such a manner as to cause any individual in a restricted area to receive in any period of one calendar quarter from radioactive material and other sources of radiation a total occupational dose in excess of the standards specified in the following table:

REMS PER CALENDAR QUARTER

1. Whole body; head and trunk; active blood-forming organs; lens of eyes; or gonads 1¼
2. Hands and forearms; feet and ankles 18¾
3. Skin of whole body 7½

(b) A licensee may permit an individual in a restricted area to receive a total occupational dose to the whole body greater than that permitted under paragraph (a) of this section, provided:

(1) During any calendar quarter the total occupational dose to the whole body shall not exceed 3 rems; and

(2) The dose to the whole body, when added to the accumulated occupational dose to the whole body, shall not exceed 5 (N-18) rems where "N" equals the individual's age in years at his last birthday; and

(3) The licensee has determined the individual's accumulated occupational dose to the whole body on Form NRC-4, or on a clear and legible record containing all the information required in that form; and has otherwise complied with the requirements of § 20.102. As used in paragraph (b), "Dose to the whole body" shall be deemed to include any dose to the whole body, gonads, active blood-forming organs, head and trunk, or lens of eye.

RESPONDENTS' RULE 29.1 STATEMENT

Unicom Corporation is the parent of Commonwealth Edison Company. Commonwealth Edison has no subsidiaries that are not wholly owned by it.

London Nuclear Services is now known as LN Technologies Corporation and is owned by The SNC Corporation. LN Technologies Corporation has no subsidiaries.